

FILE COPY

STATE OF WISCONSIN
BEFORE THE REAL ESTATE BOARD

IN THE MATTER OF DISCIPLINARY
PROCEEDINGS AGAINST

ADRIAN V. SOBOTTA,
RESPONDENT.

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FINAL DECISION
AND ORDER
LS9307011REB

The State of Wisconsin, Real Estate Board, having considered the above-captioned matter and having reviewed the record and the Proposed Decision of the Administrative Law Judge, makes the following:

ORDER

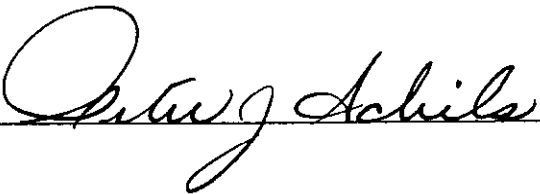
NOW, THEREFORE, it is hereby ordered that the Proposed Decision annexed hereto, filed by the Administrative Law Judge, shall be and hereby is made and ordered the Final Decision of the State of Wisconsin, Real Estate Board.

The Division of Enforcement and Administrative Law Judge are hereby directed to file their affidavits of costs, and mail a copy thereof to respondent or his or her representative, within 15 days of this decision.

Respondent or his or her representative shall mail any objections to the affidavit of costs filed pursuant to the foregoing paragraph within 30 days of this decision, and mail a copy thereof to the Division of Enforcement and Administrative Law Judge.

The rights of a party aggrieved by this Decision to petition the department for rehearing and the petition for judicial review are set forth on the attached "Notice of Appeal Information."

Dated this 9TH day of DECEMBER, 1993.



STATE OF WISCONSIN
BEFORE THE REAL ESTATE BOARD

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IN THE MATTER OF	:
DISCIPLINARY PROCEEDINGS AGAINST	:
	:
ADRIAN V. SOBOTTA,	:
RESPONDENT	:
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	PROPOSED DECISION
	Case No. LS-9307011-REB
	(DOE case number 91 REB 324)

PARTIES

The parties in this matter under § 227.44, Stats. and § RL 2.036, Wis. Adm. Code, and for purposes of review under § 227.53, Stats. are:

Complainant:

Division of Enforcement
Department of Regulation and Licensing
P.O. Box 8935
Madison, WI 53708

Respondent:

Adrian V Sobotta
P.O. Box 393
Chippewa Falls, WI 54729

Disciplinary Authority:

Real Estate Board
1400 East Washington Ave.
Madison, WI 53708

PROCEDURAL HISTORY

A This case was initiated by the filing of a complaint with the Real Estate Board on July 1, 1993. A disciplinary proceeding (hearing) was scheduled for August 24, 1993. Notice of Hearing was prepared by the Division of Enforcement of the Department of Regulation and Licensing and served personally on Mr. Sobotta on July 12, 1993.

B Mr. Sobotta did not file an Answer within 20 days of service, and attorney Roger Hall of the Division of Enforcement filed a Motion for Default on August 12, 1993 to be heard also on August 24, 1993.

C. On August 23, 1993 Mr. Sobotta contacted the undersigned administrative law judge by phone, and Mr. Hall was brought into a telephone conference. Mr. Sobotta requested a postponement of the hearing, explaining that he had mislaid the notice of hearing and just found it again. He also stated that he had not received the motion for default. Finally, he stated that he had no means of transportation and requested that he be allowed to appear by phone. Mr. Sobotta's requests were granted over Mr. Hall's objection, and the hearing was rescheduled to September 8, 1993.

D All time limits and notice and service requirements having been met, the disciplinary proceeding was held as scheduled on September 8, 1993. Mr. Sobotta appeared in person by telephone; he was not represented by legal counsel. The Real Estate Board was represented by Attorney Hall. Mr. Hall's motion for default was denied. The hearing was recorded, and a transcript of the hearing was prepared and delivered on September 28, 1993. The testimony and exhibits entered into evidence at the hearing form the basis for this Proposed Decision.

APPLICABLE STATUTES AND RULES

452.14 Investigation and discipline of licensees. ... (3) Disciplinary proceedings shall be conducted by the board according to rules adopted under s. 440.03(1). The board may revoke, suspend or limit any broker's, salesperson's or time-share salesperson's license or registration, or reprimand the holder of the license or registration, if it finds that the holder of the license or registration has: ... (i) Demonstrated incompetency to act as a broker, salesperson, time-share salesperson or cemetery salesperson in a manner which safeguards the interests of the public;

RL 15.04 Retention of records. A broker shall retain for at least 3 years exact and complete copies of all listing contracts, offers to purchase, leases, closing statements, deposit receipts, cancelled checks, trust account records and other documents or correspondence received or prepared by the broker in connection with any transaction.

RL 18.10 Commingling prohibited. A broker shall deposit only real estate trust funds in the broker's real estate trust fund account and shall not commingle the broker's personal funds or other funds in the trust account, except that a broker may deposit and keep a sum not to exceed \$300.00 from the broker's personal funds in any real estate trust account, which sum shall be specifically identified and deposited to cover service charges relating to the trust account.

RL 18.13 Bookkeeping system. A broker shall maintain and be responsible for a bookkeeping system in the broker's office consisting of at least the following:

(1) **CASH JOURNAL.** A broker shall maintain a permanent record book, called a journal, which shall show the chronological sequence in which real estate trust funds are received and disbursed ...

(2) **LEDGER** A broker shall maintain a record book which shows the receipts and the disbursements as they affect each particular transaction

(3) **ACCOUNT RECONCILIATION.** The broker or a person designated by the broker shall reconcile the real estate trust account in writing each month

(4) **OPEN LEDGER ACCOUNT LISTING (TRIAL BALANCE).** The broker shall prepare or have prepared, in conjunction with sub. (3), a written listing, "trial balance", of all open items in the real estate trust account. ...

(5) **VALIDATION.** The broker or a person designated by the broker shall review the reconciled account statement balance, the open ledger account listing, and the journal running balance to ensure that all of these records are valid and in agreement as of the date the account statement has been reconciled.

RL 18.14 Violation of rules. A broker who fails to comply with the rules in this chapter shall be considered to have demonstrated incompetency to act as a real estate broker in a manner as to safeguard the interests of the public, as specified in s. 452.14(3), Stats.

RL 24.15 Adequate funds required. Licensees shall not issue checks upon business or trust accounts which contain insufficient funds.

FINDINGS OF FACT

1. Respondent Adrian V. Sobotta is a real estate broker licensed in the state of Wisconsin, under license number 13886, and he has held that license continuously since it was originally granted on October 29, 1964. Mr. Sobotta resides in Chippewa Falls, Wisconsin.

2. Between the dates of 12/31/90 and 10/30/92 Mr. Sobotta maintained account #155722 as a real estate trust account at Northwestern Bank in Chippewa Falls.

3. Between 12/31/90 and 10/31/92 Mr. Sobotta deposited personal funds into the real estate trust account and withdrew money from the real estate trust account for personal use.

4. Mr. Sobotta did not maintain records of the trust account for three years after the dates of the transactions.

5. Overdrafts on the trust account were recorded on 6/4/91, 6/7/91, 6/19/91, 7/9/91 and 7/15/91.

6 Mr. Sobotta did not validate and review trust account records, and did not prepare trial balances or bank reconciliations.

CONCLUSIONS OF LAW

- I. The Real Estate Board is the legal authority responsible for controlling credentials for real estate brokers, under § 452.14(3), Wis. Stats. The Real Estate Board has jurisdiction over Mr. Sobotta's license.
- II. The Real Estate Board has personal jurisdiction over the Respondent under § 801.04 (2), Wis. Stats., based on his receiving notice of the proceeding.
- III. The Real Estate Board has jurisdiction over the subject-matter of a complaint alleging unprofessional conduct, under § 15.08(5)(c), Wis. Stats, § 452.14, Wis. Stats, and ch. RL 24, Wis. Admin. Code.
- IV. The respondent, Adrian V. Sobotta, violated § RL 15.04, Wis. Admin. Code, by failing to retain complete copies of all records of trust account transactions for three years.
- V. The respondent, Adrian V. Sobotta, violated § RL 18.13(3), Wis. Admin. Code by failing to reconcile the trust account records in writing each month.
- VI. The respondent, Adrian V. Sobotta, violated § RL 18.13(4), Wis. Admin. Code by failing to prepare a trial balance on the trust account each month.
- VII. The respondent, Adrian V. Sobotta, violated § RL 18.13(5), Wis. Admin. Code by failing to ensure that all trust account records are valid and in agreement as a part of reconciliation.
- VIII. The respondent, Adrian V. Sobotta, violated § RL 18.10, Wis. Admin. Code by commingling personal funds with real estate trust funds in his trust account.
- IX. The respondent, Adrian V. Sobotta, violated § RL 24.15, Wis. Admin. Code by failing to maintain adequate funds in his trust account.
- X. The violations in IV through IX above demonstrate incompetency to act as a real estate broker in a manner as to safeguard the interests of the public, in violation of § RL 18.14, Wis. Admin. Code, and professional discipline is appropriate under § 452.14(3), Stats.

ORDER

THEREFORE, IT IS ORDERED that the license issued to Adrian V. Sobotta to act as a real estate broker is revoked, effective ten days after this order is signed on behalf of the board.

IT IS FURTHER ORDERED that Adrian V. Sobotta pay the costs of this proceeding, as authorized by § 440.22(2), Wis. Stats. and § RL 2.18, Wis. Admin. Code.

OPINION

The disciplinary complaint in this matter alleged that the respondent, Adrian V. Sobotta, committed a number of violations of sound real estate practice, all related to his unprofessional management of a real estate trust fund account in 1991 and 1992. (The complaint as written alleges violations of §§ RL 15.04, 18.3(3), 18.3(4), 18.3(5), 18.10, 18.13 (1), 18.13(2), 18.14, and 24.15. The references to §§ 18.3(3), (4) and (5) are obviously a typographical error, as it is clear from the context and the language of the complaint that the charges alleged violations of RL 18.13(3), (4) and (5).)

Mr. Sobotta was ordered as part of an investigation by the board to provide his records for bank account #155722, which he maintained as a real estate trust account at the Northwestern Bank in Chippewa Falls. Mr. Sobotta did not provide those records. He explained that he had kept his records for that account in a chest of drawers, that he had placed the chest of drawers in a storage location, and that on March 21, 1992 the chest of drawers was auctioned off to pay for accumulated charges on the storage unit. He also told the investigator that his checkbook for the account was taken from the glove compartment of his vehicle. According to these explanations, Mr. Sobotta was only partially responsible for the lack of records, but he did in fact fail maintain trust account records for three years, and this is at least a technical violation of § RL 15.04. On the other hand, Mr. Sobotta's lack of records did not prove that he had failed to keep a cash journal and a ledger in some form at some time, so I do not find a violation of §§ RL 18.13(1) and (2).

An accountant employed by the department, Jeanne Pegelow, performed an audit of Mr. Sobotta's trust account. To do so, she reconstructed a journal (exhibit 2) and a ledger (exhibit 3) from the bank's records for the account (exhibits 1 and 4) for the period from December 31, 1990 to February 28, 1992. The reconstructed journal shows deposits to the trust account which correspond to Mr. Sobotta's receipt of earnest money payments from various real estate transactions (exhibits 5 - 9), as well as disbursements which appear to be legitimate real estate expenses. However, the journal clearly shows that Mr. Sobotta wrote checks on 17 different occasions from the trust account to his company, Blue Diamond Realty, which cannot be related to any legitimate real estate transaction. The journal shows that on four occasions Mr. Sobotta made deposits to the trust account which are unrelated to any real estate transaction. And the journal shows that the balance in the account became negative on three separate occasions, and that checks presented for payment during all of those periods were returned for insufficient funds.

Mr. Sobotta maintained at first that all of the checks which were written to Blue Diamond Realty were for "survey costs, abstract fees, things like that", but Mr. Hall established through cross-examination that Mr. Sobotta deposited personal funds into the account and made payments to himself and others which were not strictly related to real estate transactions. Nor did Mr. Sobotta rebut the evidence that he maintained inadequate funds in the account. These facts clearly established Mr. Sobotta's violations of §§ RL 18.10 and RL 24.15.

The preponderance of the evidence also shows that Mr. Sobotta did not validate and review trust account records, and that he did not prepare trial balances or bank reconciliations. First, this is shown circumstantially by the fact that his original bank statements did not show any reconciliation calculations. Second, and more compellingly, his failure to review and reconcile the account records is shown by the logical conclusion that if he had done so, he would have been aware of what has happened, and any conscious awareness of how he was using those funds would have amounted to fraud or misappropriation of funds. By these failures, Mr. Sobotta violated §§ RL 18.13(3), RL 18.13(4), and RL 18.13(5).

Discipline.

Mr. Sobotta's misuse of his trust account and the trust funds in the account was a serious breach of his responsibility to his clients, and it merits strong discipline. The purposes of professional discipline have been set forth in Wisconsin Supreme Court Rule SCR 21.03(5) and in various attorney discipline cases, including Disciplinary Proc. Against Kelsay, 155 Wis.2d 480, 455 N.W.2d 871 (1990). In that case the Wisconsin Supreme Court stated "discipline for lawyer misconduct is not intended as punishment for wrongdoing; it is for the protection of the public, the courts and the legal profession from further misconduct by the offending attorney, to deter other attorneys from engaging in similar misconduct and to foster the attorney's rehabilitation." That reasoning has been extended by regulatory agencies to disciplinary proceedings for other professions.

Protection of the public in this case requires the board to ensure that Mr. Sobotta practice as a real estate broker only if he can do so competently and conscientiously. Mr. Sobotta stated that revocation of his license should not be necessary because he has learned his lesson, but such a statement implies that these violations were the result either of sloth or of a conscious disregard for his professional obligations, and that he is capable by himself of making the necessary changes in his behavior. The simple circumstances of Mr. Sobotta's participation in this case belie that. First, his address on file with the board is not his current address, and he has never informed the board of that change. Second, once he received the complaint and notice of hearing in this matter he did not respond until the day before the hearing. He may well have procrastinated or avoided his duty to the board until the last possible minute, which would be damning evidence of his lack of a sense of professional responsibility. His explanation was that he misplaced the documents, but even this demonstrates an unprofessional neglect of such a serious matter. These facts lead to the conclusion that Mr. Sobotta cannot be relied on to reform himself, and that the board must take some action to protect the public. A number of options are available, of which revocation would be the safest and most effective; others include an extensive program of required education, or a limited license requiring close supervision and/or regular reporting to the board.

To foster Mr. Sobotta's rehabilitation, discipline would have to cause him to see how serious his actions were and give him an opportunity to correct his behavior. A course of required education coupled with a significant suspension might accomplish this.

However, the deterrence of other professionals from similar actions requires nothing less than revocation. Maintaining a real estate trust account is a professional practice which must be undertaken with the greatest seriousness, precisely because temptations can arise to "temporarily borrow" the money in such an account. Mr. Sobotta did so, and ended up overdrawing the account and being unable to repay an earnest money deposit. The message which must be read in this case by all other real estate professionals is that playing fast and loose with a trust account will result in a loss of license.

Costs.

The assessment of costs against a disciplined professional is authorized by § 440.22(2), Wis. Stats. and § RL 2.18, Wis. Admin. Code, but neither the statute nor the rule clearly indicates the circumstances in which costs are to be imposed. I am aware that this Board has historically imposed costs. However, the approach I prefer is to use costs as an incentive to encourage respondents to cooperate with the process, and thus to impose costs only if the respondent has been uncooperative or dilatory. Mr. Sobotta called the day before his scheduled hearing and stated that he had misplaced the complaint and notice of hearing and just found them. The twenty-day deadline for filing an answer had already passed and Mr. Hall had already filed a motion for default judgment. However, to ensure that Mr. Sobotta received a fair hearing, his request for additional time was granted and the hearing was rescheduled. In misplacing paperwork of this nature Mr. Sobotta demonstrated either gross ineptitude or a lack of respect for this board, and he caused delay and extra work for the Division's attorney. Costs are justified, not because they should routinely be imposed, but because of this individual licensee's irresponsibility.

Dated October 19, 1993.


John N. Schweitzer
Administrative Law Judge
Department of Regulation and Licensing

BDLS2-2803

NOTICE OF APPEAL INFORMATION

**(Notice of Rights for Rehearing or Judicial Review,
the times allowed for each, and the identification
of the party to be named as respondent)**

The following notice is served on you as part of the final decision:

1. Rehearing.

Any person aggrieved by this order may petition for a rehearing within 20 days of the service of this decision, as provided in section 227.49 of the Wisconsin Statutes, a copy of which is attached. The 20 day period commences the day after personal service or mailing of this decision. (The date of mailing of this decision is shown below.) The petition for rehearing should be filed with the State of Wisconsin Real Estate Board/

A petition for rehearing is not a prerequisite for appeal directly to circuit court through a petition for judicial review.

2. Judicial Review.

Any person aggrieved by this decision has a right to petition for judicial review of this decision as provided in section 227.53 of the Wisconsin Statutes, a copy of which is attached. The petition should be filed in circuit court and served upon the State of Wisconsin Real Estate Board

within 30 days of service of this decision if there has been no petition for rehearing, or within 30 days of service of the order finally disposing of the petition for rehearing, or within 30 days after the final disposition by operation of law of any petition for rehearing.

The 30 day period commences the day after personal service or mailing of the decision or order, or the day after the final disposition by operation of the law of any petition for rehearing. (The date of mailing of this decision is shown below.) A petition for judicial review should be served upon, and name as the respondent, the following: the State of Wisconsin Real Estate Board.

The date of mailing of this decision is December 10, 1993.

STATE OF WISCONSIN
BEFORE THE REAL ESTATE BOARD

IN THE MATTER OF	:	
DISCIPLINARY PROCEEDINGS AGAINST	:	AFFIDAVIT OF COSTS OF
	:	OFFICE OF BOARD LEGAL SERVICES
ADRIAN V. SOBOTTA,	:	Case No. LS-9307011-REB
RESPONDENT.	:	

John N. Schweitzer affirms the following before a notary public for use in this action, subject to the penalties for perjury in sec. 946.31, Wis. Stats.:

1. I am an attorney licensed to practice law in the State of Wisconsin, and am employed by the Wisconsin Department of Regulation and Licensing, Office of Board Legal Services.
2. In the course of my employment, I was assigned as the administrative law judge in the above-captioned matter.
3. The costs of the proceeding for the Office of Board Legal Services are set out below:

a. Administrative Law Judge Expense @ \$23.99/hour.

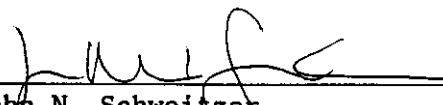
Prehearing conference, 8/23/93
3/4 hr. = \$18.00

Conduct hearing, 9/8/93
2 hrs. = \$47.98

Read, research, and write proposed decision
9/9/93 through 10/19/93; 7 hrs. = \$167.93

b. Reporter Expense
(detailed invoice available) = \$329.10

Total costs for Office of Board Legal Services = \$563.01



John N. Schweitzer
Administrative Law Judge

Sworn to and signed before me this 13th day of December, 1993.

Donethin Dunn, Notary Public, State of Wisconsin.

My commission 11-6-94.

STATE OF WISCONSIN
BEFORE THE REAL ESTATE BOARD

IN THE MATTER OF THE DISCIPLINARY :
PROCEEDINGS AGAINST :

ADRIAN V. SOBOTTA,
RESPONDENT. :

AFFIDAVIT OF COSTS
91 REB 324

STATE OF WISCONSIN)
) ss.
COUNTY OF DANE)

Roger R. Hall, being duly sworn, deposes and states as follows:

1. That I am an attorney licensed in the state of Wisconsin and is employed by the Wisconsin Department of Regulation and Licensing, Division of Enforcement:
2. That in the course of those duties I was assigned as a prosecutor in the above-captioned matter; and
3. That set out below are the costs of the proceeding accrued to the Division of Enforcement in this matter, based upon Division of Enforcement records compiled in the regular course of agency business in the above-captioned matter.

PROSECUTING ATTORNEY EXPENSE

<u>Date</u>	<u>Activity</u>	<u>Time Spent</u>
10/20/92	Review file	2.0 hrs.
06/08/93	Draft Complaint and Notice of Hearing	1.6 hrs
06/11/93	Conference with auditor Jeanne Pegelow	0.5 hrs.
08/03/93	Draft Affidavit of Default	1.1 hrs.
08/18/93	Conference with auditor Jeanne Pegelow	1.3 hrs
08/20/93	Preparation for hearing	2.7 hrs.
09/02/93	Conference with Jeanne Pegelow	1.0 hrs.
09/07/93	Conference with Jeanne Pegelow	0.8 hrs.
09/08/93	Conference with Garrette; appear at hearing. Preparation for hearing.	2.6 hrs.
	Total Hours	13 hrs. 36 min.

Total attorney expense for 13.6 hours and minutes at \$30.00 per hour (based upon average salary and benefits for Division of Enforcement attorneys) equals: \$408.00

INVESTIGATOR EXPENSE FOR WILLIE E. GARRETTE

<u>Date</u>	<u>Activity</u>	<u>Time Spent</u>
10/03/91	Review file and dictate letters	0.5 hrs.
10/08/91	Proof letters and assemble and mail	0.2 hrs
10/21/91	Call W/R	0.2 hrs.
11/00/91	Subpoena mailed to Mr. Sobotta	0.2 hrs.
01/31/92	Call to Chippewa Falls Police Dept.	0.2 hrs
01/31/92	Draft letter to Chippewa Falls Police Dept.	0.2 hrs.
06/09/92	Draft letter to Chippewa Falls Police Dept.	0.2 hrs.
06/12/92	Proof and revise letter	0.1 hrs.
	Total Hours	1 hr. 48 min.

Total investigator expense for 1.8 hours and minutes at \$18.00 per hour (based upon average salary and benefits for Division of Enforcement investigators) equals: \$32.40

AUDITOR EXPENSE FOR JEANNE PEGELOW

	Total Hours	27 hrs. 30 min.
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Total auditor expense for 27 hours and 30 minutes at \$18.00 per hour (based upon average salary and benefits for Division of Enforcement auditors) equals: \$495.00

TOTAL ASSESSABLE COSTS \$935.40

Roger R. Hall
 Roger R. Hall, Attorney

Subscribed and sworn to before me this 10TH day of November, 1993.

Notary Public

My Commission: PERMANENT

RRH:dms
 ATY-ALG232

TRANSMIT CONFIRMATION REPORT

NO.	:	002
RECEIVER	:	
TRANSMITTER	:	7157239644
DATE	:	WIS. DEPT. REG. & LIC..
DURATION	:	DEC 22'93 11:03
MODE	:	08'11 STD
PAGES	:	12
RESULT	:	OK